Malaysian Airports Holdings Bhd v Abdul Hamid bin Mydin

HIGH COURT (PENANG) — JUDICIAL REVIEW APPLICATION NO 25–79–11 OF 2015
COLLIN SEQUERAH JC
29 AUGUST 2016

Civil Procedure — Judicial review — Application for leave — Industrial Court found respondent's dismissal without just cause or excuse and ordered award in favour of respondent — Applicant applied for judicial review against decision of Industrial Court — Whether application filed outside prescribed time pursuant to O 53 r 3(6) of the Rules of Court 2012

Labour Law — Employment — Dismissal — Industrial Court found respondent's dismissal without just cause or excuse and ordered award in favour of respondent — Whether there was clarification regarding two contradictory medical reports adduced by both parties — Whether Industrial Court justified in invoking adverse inference under s 114(g) of the Evidence Act 1950 against applicant for non-calling of material witness — Evidence Act 1950 s 114(g) — Rules of Court 2012 O 53 r 3(6)

The respondent was medically board out from his employment by the applicant due to the fact that he was suffering from major depression with psychotic features. The respondent referred the case to the Industrial Court and the latter found that he was dismissed without just cause or excuse. The Industrial Court further ordered the applicant to pay compensation in lieu of reinstatement and back wages ('the award') to the respondent. Dissatisfied with the decision, the applicant filed the present action for judicial review. The respondent brought a preliminary objection that the leave application was filed outside the prescribed time of three months provided under O 53 r 3(6) of the Rules of Court 2012 ('the ROC') as the date of first communication of the award was on 30 July 2015 ie the date on which the award was faxed to the applicant and the present application was filed on 5 November 2015. Based on the submissions of both parties, the issues for decision were: (a) whether there was clarification regarding the two contradictory medical reports adduced by both parties; (b) whether Industrial Court was justified in invoking the adverse inference under s 114(g) of the Evidence Act 1950 ('the Act') against the applicant for the non-calling of Dr Anna Letchumi who conducted the medical examination on the respondent; and (c) whether the applicant had an obligation to continue the employment of the respondent by making adjustments to his job function or scope.

Held, dismissing the application with costs; and upholding the decision of the Industrial Court:

(1) Based on the affidavits, there was nothing to show that the award was faxed and received by the applicant's solicitors on 30 July 2015. The decision of the Industrial Court was communicated to the applicant on 6 August 2015 when the applicant received the award by post. The applicant had therefore not run foul of the provisions of O 53 r 3(6) of the ROC (see paras 58 & 60–61).

(2) During the trial before the Industrial Court, the psychiatrist had clarified the contradiction between the two medical reports in re-examination when she confirmed that the correct diagnosis was 'Tidak sihat buat selama-lamanya'. There was therefore clarification regarding the conflicting medical reports and the learned Industrial Court Chairman had erred in finding that there existed an unexplained contradiction (see paras 64–65).

(3) Although the applicant only wrote once to the hospital where Dr Anna Letchumi had last worked and there were no other attempts by the applicant made to locate the witness, but there was no suppression of evidence on the part of the applicant. Under the circumstances, the Industrial Court was not justified in invoking the adverse inference under s 114(g) of the Act against the applicant (see paras 70–71).

(4) It was clear that the approach regarding cases of this nature was to consider whether the workman could have continued in his employment by the making of adjustments such as transfers or even the creation a special job where circumstances permit. Under all the circumstances therefore, the Industrial Court had not committed any error by considering whether the respondent could have been reassigned to a less strenuous job close to his family and to a position that did not involve the use for firearms. There was no error on the part of the Industrial Court in this respect to warrant the exercise of a judicial review in the applicant's favour. The applicant therefore had failed in its obligation to continue the employment of the respondent by making adjustments to his job scope and relocating him nearer his family (see paras 86–87 & 89).

[Bahasa Malaysia summary

Responden melalui kajian lembaga perubatan diberhentikan kerja oleh pemohon disebabkan oleh fakta bahawa dia mengalami kemurungan serius dengan ciri-ciri psikotik. Responden merujuk kes tersebut ke Mahkamah Perusahaan dan Mahkamah Perusahaan mendapati bahawa dia telah dipecat tanpa sebab atau alasan yang kukuh. Mahkamah Perusahaan kemudiannya mengarahkan pemohon untuk membayar pampasan sebagai ganti gaji semula dan kebelakang ('award') kepada responden. Tidak berpuas hati dengan keputusan tersebut, pemohon memfailkan tindakan ini untuk semakan

kehakiman. Responden membuat bantahan awal bahawa permohonan tersebut difailkan di luar tempoh tiga bulan yang ditetapkan yang diperuntukkan di bawah A 53 k 3(6) Kaedah-Kaedah Mahkamah 2012 ('KKM') iaitu tarikh komunikasi pertama award adalah pada 30 Julai 2015 iaitu tarikh di mana award tersebut difaks kepada pemohon dan permohonan ini difailkan pada 5 November 2015. Berdasarkan hujahan kedua-dua pihak, isu-isu untuk diputuskan ialah: (a) sama ada terdapat penjelasan mengenai dua laporan perubatan bercanggah yang dikemukakan oleh kedua-dua pihak; (b) sama ada Mahkamah Perusahaan bertindak wajar dalam menggunakan anggapan berlawanan di bawah s 114(g) Akta Keterangan 1950 ('Akta') terhadap pemohon kerana tidak memanggil Dr Anna Letchumi yang menjalankan pemeriksaan perubatan ke atas responden; dan (c) sama ada pemohon mempunyai kewajipan untuk meneruskan pekerjaan responden dengan membuat pelarasan kepada fungsi atau skop kerjanya.

Diputuskan, menolak permohonan dengan kos; dan menegakkan keputusan Mahkamah Perusahaan:

(1) Berdasarkan afidavit, tiada apa-apa yang menunjukkan bahawa award tersebut difaks dan diterima oleh peguamcara pemohon pada 30 Julai 2015. Keputusan Mahkamah Perusahaan telah disampaikan kepada pemohon pada 6 Ogos 2015 apabila pemohon menerima award tersebut melalui pos. Pemohon dengan itu tidak bertentangan dengan peruntukan A 53 k 3(6) KKM (lihat perenggan 58 & 60–61).

(2) Semasa perbicaraan di hadapan Mahkamah Perindustrian, pakar psikiatri telah menjelaskan percanggahan antara kedua-dua laporan perubatan dalam pemeriksaan semula apabila beliau mengesahkan bahawa diagnosis yang betul adalah 'Tidak sihat buat selama-lamanya. Oleh itu terdapat penjelasan mengenai laporan perubatan yang bercanggah dan Pengerusi Mahkamah Perusahaan yang bijaksana terkhilaf dalam dapatan bahawa terdapat kewujudan percanggahan yang tidak dapat dijelaskan (lihat perenggan 64–65).

(3) Walaupun pemohon hanya menulis sekali ke hospital di mana Dr Anna Letchumi kali terakhir bekerja dan tiada percubaan lain oleh pemohon yang dibuat untuk mencari saksi tersebut, namun tiada penindasan bukti di pihak pemohon. Dalam keadaan ini, Mahkamah Perusahaan tidak wajar dalam menggunakan anggapan berlawanan di bawah s 114(g) Akta terhadap pemohon (lihat perenggan 70–71).

(4) Adalah jelas bahawa pendekatan mengenai kes-kes seperti ini adalah untuk mempertimbangkan sama ada pekerja itu boleh meneruskan pekerjaannya dengan membuat pelarasan seperti pemindahan atau penciptaan kerja khas di mana keadaan membenarkan. Di bawah semua keadaan oleh itu, Mahkamah Perusahaan tidak melakukan apa-apa kesilapan dengan mempertimbangkan sama ada responden boleh

ditugaskan semula kepada kerja yang kurang berat berdekatan dengan keluarga dan kepada kedudukan yang tidak melibatkan penggunaan senjata api. Tiada kesilapan di pihak Mahkamah Perusahaan dalam hal ini untuk mewajarkan pelaksanaan semakan kehakiman bagi pihak pemohon. Pemohon dengan itu telah gagal dalam kewajipannya untuk terus bekerja dengan responden dengan membuat pelarasan skop kerja dan menempatkan dia berdekatan keluarganya (lihat perenggan 86–87 & 89).]

Notes

For cases on application for leave, see 2(3) *Mallal's Digest* (5th Ed, 2015) paras 5580–5583.

For cases on dismissal, see 8(1) *Mallal's Digest* (5th Ed, 2015) paras 1788–1794.

Cases referred to

Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223, CA (refd)

Ambank (M) Bhd v Menteri Sumber Manusia & Anor and another appeal [2014] 6 MLJ 377; [2014] 1 LNS 686, CA (refd)

Council of Civil Service Unions and Others v Minister for the Civil Service [1985] AC 374, HL (refd)

Gopalakrishnan a/l Vasupillai v Goodyear Malaysia Berhad and Anor [2010] MLJU 651, HC (refd)

Munusamy v PP [1987] 1 MLJ 492, SC (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147; [1997] 1 AMR 433, FC (refd)

Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1, FC (refd)

Sheila a/p Sangar v Proton Edar Sdn Bhd & Anor [2009] 4 MLJ 285, HC (refd)

Syed Mahadzir bin Syed Abdullah v Ketua Polis Negara & Anor [1994] 3 MLJ 391; [1994] 3 CLJ 244, HC (refd)

Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261, CA (refd)

Legislation referred to

Evidence Act 1950 s 114(g)
Industrial Relations Act 1967 s 30(5)
Rules of Court 2012 O 53, O 53 r 3(6)

Vijayan Venugopal (Shearn Delamore & Co) for the applicant.
Habib Rahman (Mohd Imtiaz Choong & Partners) for the respondent.

Collin Sequerah JC:

INTRODUCTION

[1] This is a judicial review application filed pursuant to O 53 of the Rules of Court 2012 for an order of certiorari to quash the decision of the Industrial Court in Award No 914 of 2015 dated 28 July 2015 in relation to the respondent's dismissal from the employment by the applicant.

[2] The learned Chairman of the Industrial Court had held that the respondent was dismissed without just cause or excuse and ordered the applicant to pay compensation in lieu of reinstatement and back wages amounting to RM62,957.56 to the respondent's solicitors within 30 days from the date of the said award.

MATERIAL FACTS

[3] The respondent commenced employment with the applicant as 'Pembantu Keselamatan' on 1 March 1981 and was eventually promoted to 'Pengawal Keselamatan Tingkatan Kanan' on 8 January 1991.

[4] The respondent was then transferred from Pulau Pinang International Airport to Kuala Lumpur International Airport effective 1 September 1999.

[5] On 30 August 2000, the respondent was examined by Dr Marhani Midin and Dr Anna Letchumi at Hospital Tengku Ampuan Rahimah Klang due to 'kesiuman otaknya diragukan'.

[6] Upon being examined, it was revealed that the respondent was suffering from major depression with psychotic features with persisting psychosocial stressors. The medical board recommended that, 'Beliau disyorkan untuk kembali kepangkuan keluarga dan meneruskan rawatan untuk penyakitnya'.

[7] Vide a letter dated 26 September 2000 from Malaysia Airports (Sepang) Sdn Bhd, the applicant was informed that the Medical Board has decided that the respondent is not fit for work as 'Pembantu Keselamatan'.

[8] In light of the foregoing, the applicant proceeded to medically board out the respondent in accordance with article 56 of the second collective agreement with effect from 16 October 2000 vide a letter dated 9 October 2000. The said letter also stated that the respondent will be paid retirement benefits according to the formula stated therein.

[9] The respondent was accordingly paid RM20,380.48 as retirement

benefits. The Industrial Court held that the respondent was dismissed without just cause or excuse and gave its award. The applicant being aggrieved, filed for judicial review.

THE APPLICANT'S SUBMISSION

[10] The applicant submitted that in arriving at its decision, the learned Chairman of the Industrial Court ('the learned Chairman') had taken the following factors into account, inter alia:

(a) the applicant had failed to explain the contradiction between two medical reports produced by the applicant and the respondent;

(b) the respondent did not give his consent to be medically boarded out by the applicant; and

(c) the applicant had failed to produce a material witness, Dr Anna Letchumi during the hearing at the Industrial Court.

[11] In so doing the applicant submitted that the Industrial Court had committed several material errors of law and/or had acted outside its jurisdiction.

The applicant's purported failure to explain the two medical reports

[12] The applicant contended that after conducting the examination on the respondent on 30 August 2000 at Hospital Tengku Ampuan Rahimah Klang, the medical board was of the opinion that the respondent was suffering from major depression with psychotic features with persisting psychosocial stressors. It was recommended by the medical board that the respondent is not fit to continue with his job as an aviation security personnel. The relevant portion of the medical report stated the following:

> 5. Kami mengesyorkan dia dianggap sebagai tidak sihat buat selama-lamanya/~~*tidak sihat buat sementara/*sihat untuk bertugas semula.*~~

[13] On the other hand, the medical report produced by the respondent stated as follows:

> 5. Kami mengesyorkan dia dianggap sebagai tidak sihat buat selama-lamanya/~~*tidak sihat buat sementara~~/*sihat untuk bertugas semula.*

[14] The applicant submitted that it was the evidence of COW1 that her testimony was not supported by the medical report produced by the respondent.

[15] In explaining both medical reports, COW1 testified during re-examination as follows:

> Q2. Can a patient be not sihat buat selama-lamanya dan sihat untuk bertugas semula?
>
> A. No.
>
> Q3. For this particular Claimant, which was the correct diagnosis for him?
>
> A. Tidak sihat buat selama-lamannya.

[16] Despite the testimony by COW1, the learned Chairman concluded on the issue of the two medical reports as follows:

> In fact, it is my view that it is for the Company to clarify the existence of the 2 medical reports instead of the Claimant and this; the Company has failed to do.

[17] The applicant submitted that in arriving at the aforesaid decision, the learned Chairman had, inter alia:

(a) failed to take into consideration the evidence of COW1, who was the psychiatrist at the material time who had sufficiently explained the rationale behind the recommendation to medically boarding out the respondent;

(b) failed to critically evaluate the evidence of COW1 who confirmed that her testimony was based on the medical report produced by the applicant; and

(c) failed to take into account the evidence of COW1 who confirmed that she signed the medical report produced by the applicant.

The respondent did not give his consent to be medically boarded out

[18] The applicant also submitted that the learned Chairman committed an error of law when it found that the dismissal was unfair on the basis, inter alia, that the respondent did not give his consent to be medically boarded out.

[19] The applicant submitted that it was the respondent who asserted that he did not give any consent to be medically boarded out by the applicant. Therefore it was incumbent on the respondent to produce evidence and/or witness to prove such assertion. However, there was no evidence produced by the respondent to support his bare assertion. In fact, the evidence before the learned Chairman revealed that the evidence of the respondent on this issue was contradicted by his own witness, CLW2, who accompanied the respondent before the medical board.

[20] Despite the inconsistencies of the respondent's evidence, the learned Chairman nevertheless ruled that the respondent did not give any consent to be medically boarded out and this was supported by the evidence of CLW2.

The applicant's purported failure to produce a material witness

[21] The applicant submitted that the learned Chairman held that the applicant had failed to secure the attendance of Dr Anna Letchumi and invoked the adverse inference against the applicant under s 114(g) of the Evidence Act 1950.

[22] The applicant contended that based on the medical report, Dr Anna Letchumi and COW1 conducted the medical examination on the respondent on 30 August 2000. The hearing at the Industrial Court took place on 8 April 2015. 15 years had elapsed since the medical board made its recommendation to medically board out the respondent. They submitted therefore that the applicant had taken all reasonable steps to secure the attendance of Dr Anna Letchumi and this is evident from the testimony of COW2 which had not been fully appreciated by the learned Chairman.

[23] The applicant's witness, Hadidah bt Ahsan, the Senior Manager, Employee Relations ('COW2') testified that the applicant had attempted to call Dr Anna Letchumi as a witness for the Industrial Court proceeding. However, the applicant was informed by Hospital Tengku Ampuan Rahimah, Klang vide a letter dated 19 March 2014 that Dr Anna Letchumi had retired from service.

[24] As a result, there was no evidence led by the respondent to show that the applicant was withholding or suppressing the attendance of Dr Anna Letchumi or was refusing to bring her as a witness. This clearly was a genuine case where the witness could not be located. The applicant submitted that s 114(g) of the Evidence Act 1950 should not have been invoked at all by the learned Chairman.

THE RESPONDENT'S SUBMISSION

Preliminary objection

[25] The respondent submitted that under O 53 r 3(6) of the Rules of Court 2012, it is mandatory to file an application for judicial review within three months from the date when the grounds of application arose or when the decision was first communicated to the applicant.

[26] The Industrial Court delivered its award on 28 July 2015 and it was communicated to the applicant by way of facsimile ('fax') on 30 July 2015.

[27] It was clear from the letter of the Industrial Court dated 29 July 2015 that, the award was faxed to the applicant on 30 July 2015.

[28] Therefore they submitted, the time for the applicant to file an application for judicial review starts from 30 July 2015 and not on 6 August 2015 when the applicant received the award through post.

[29] Order 53 r 3(6) states that time runs from the date the decision was first communicated, and therefore the communication through fax on 30 July 2015 was the date of first communication.

[30] The applicant had up to 30 October 2015 to file an application for judicial review but they filed the application for judicial review only on 5 November 2015. The applicant failed to apply for extension to abridge the time. In view of that, the application for judicial review was irregular and ought to be dismissed outright.

Decision to medically board out the respondent was not justified

[31] Submitting on the merits, the respondent said that the applicant's own phyciatrist admitted both the medical reports issued by her contained two conclusions which contradict each other. However the applicant choose to accept a medical report which was favorable to them and disregarded the medical report which was favourable to the respondent.

[32] In view of the contradictions of the two medical reports, the law warranted that a statement favorable to the respondent ought to be accepted.

[33] They submitted that as the applicant had acted on an equivocal report and failed to adopt the favorable statements to the respondent in the medical report, the dismissal of the respondent's employment with the applicant was without just cause and excuse. Accordingly they submitted that the Industrial Court had acted correctly in ruling the dismissal of the respondent by the applicant as unjust and unlawful.

[34] They further submitted that the Industrial Court had appropriately considered whether the respondent consented for him to be medically boarded out by the applicant.

[35] The conclusion of the Industrial Court was supported by the following facts:

(a) if the existence of the purported consent is true, COW1 ought to have mentioned it in the examination-in-chief but it was not raised at all. The purported agreement was only raised by COW1 in cross-examination when she could not justify her action in recommending to medically board out when the medical board found there were chances for the respondent to recover; and

(b) the purported consent was not pleaded in the statement of reply filed by the applicant.

The Industrial Court was correct in drawing adverse inferences against the applicant

[36] The respondent submitted that the Industrial Court, in view of the existence of two contradictory medical reports, issued by the same medical board correctly drew an adverse inference for the failure of the applicant in calling another member of the medical board, Dr Anna Letchumi.

[37] The reasons provided by the applicant were without any cogency or merit. COW2 testified that she tried to locate Dr Anna Letchumi but failed as she was informed by the Tunku Ampuan Rahimah Hospital that the witness had retired. However, there was no attempt shown that other attempts had been made to locate her other than just writing to the said hospital where she last worked. There was also no evidence shown on the attempts made to locate the present address of the said witness.

[38] In light of the above, no genuine effort was made by the company to secure the attendance of Dr Anna Letchumi at the trial and no evidence was tendered to prove that the applicant had made all reasonable efforts to secure her attendance. The fact that Dr Anna Letchumi had retired was not a cogent reason to excuse her non attendance in court.

[39] The respondent submitted therefore that the decision of the Industrial Court was in line with the facts disclosing two contradictory medical reports warranting a clarification from the other medical board member.

The applicant ought to have transferred the respondent nearer his family

[40] The respondent submitted that even assuming the medical report as relied upon by the applicant was in order, the reasoning of COW1 was flawed. She was entrusted with a duty to evaluate medically whether the respondent could continue with the employment with the company and whether the

respondent could be cured. She was also under a duty to make recommendation medically as can be seen from the medical report.

[41] COW1 testified that the respondent had a bright chance to recover provided the respondent were reunited with his family in Penang.

[42] However, COW1 stated that the option to place the respondent back with his family was not available at that time. Therefore, she had to recommend the respondent to be medically boarded out.

[43] The respondent submitted that it was not the duty of COW1 to consider whether the option for the respondent to be with his family was a deciding factor in evaluating the suitability of the respondent to continue the employment with the applicant.

[44] If COW1 had felt that the respondent could recover by transferring him to Penang, she should have recommended that the respondent be transferred back to Penang instead of recommending medical boarding out which would ultimately affect the livelihood of the respondent.

[45] The medical board was set up to look into the question as to whether the respondent was medically fit to continue his employment with the applicant or not.

[46] However, the medical board had considered a non medical issue as a foundation for their recommendation in terminating the respondent's employment with the company.

[47] It was submitted that Dr Yushada Budiman, a psychiatrist from Penang General Hospital in 22 August 2000 had strongly recommended that the respondent to be transferred back to Penang.

[48] The respondent in fact wrote to the applicant in 10 May 2000 requesting him to be transferred to Alor Setar, Kedah a place which was nearer to his family but was denied.

[49] The respondent's request for transfer was not only supported by psychiatrists but also by eminent persons such as then Deputy Prime Minister Tun Abdullah bin Hj Ahmad Badawi, Dato Lee Lam Thye, social activist, Dato Fauzi Abdul Rahman, the Deputy Minister in Prime Minister's Department, all of which were totally ignored.

GROUNDS FOR JUDICIAL REVIEW

[50] It has been now been commonly accepted that the grounds for judicial review in summary are as follows:

(a) illegality — that the decision maker had failed to keep strictly within the perimeters of his powers;

(b) irrationality or '*Wednesbury* unreasonableness' — that the decision was 'so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it'; and

(c) procedural impropriety — that the decision maker failed to observe basic rules of natural justice and or procedural rules.

[51] See *Council of Civil Service Unions and others v Minister for the Civil Service* [1985] AC 374 and *Ambank (M) Berhad v Menteri Sumber Manusia & Anor and other appeal* [2014] 6 MLJ 377; [2014] 1 LNS 686.

[52] Over the course of time the principle of proportionality has also been added to the above categories thus widening the scope of judicial intervention of administrative action by way of judicial review.

[53] In *Sheila a/p Sangar v Proton Edar Sdn Bhd & Anor* [2009] 4 MLJ 285 the principles governing judicial review was neatly encapsulated as follows:

[54] The first principle of judicial review concerned the decision making process and not the merits, substance or justification. The second principle is that there can be an exception to the first principle where the court could examine the substance or justification to satisfy itself that the decision maker had not transgressed the principles of procedural impropriety, illegality or irrationality.

[55] The boundaries however, that traditionally distinguished review for process and that of substance have been removed. The courts are now therefore more inclined to review for substance as well in an appropriate case where the situation so requires. See *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147; [1997] 1 AMR 433 and *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1.

ANALYSIS, FINDINGS AND DECISION

Preliminary objection

[56] In respect of the contention by the respondent that the leave application

A was filed outside the prescribed time under O 53 r 3(6) of the Rules of Court 2012, I find no merit in the argument.

[57] The Industrial Court delivered its award on 28 July 2015 and according to the respondent it was sent by fax on 30 July 2015.

B

[58] I agree with the submission advanced by learned counsel for the applicant that upon a perusal of the affidavits, there is nothing to show that the award was faxed and received by the applicant's solicitors on 30 July 2015.

C

[59] Such conclusive evidence of the award being sent by fax on 30 July 2015 and received by the solicitors for the applicant if at all could only have come from an affidavit from the Industrial Court confirming this. I agree with the contention by counsel for the applicant that without this there is no evidence
D that the applicant had received the fax on 30 July 2015.

[60] I therefore find that the decision of the Industrial Court was communicated to the applicant on 6 August 2015 when the applicant received the award by post.

E

[61] The applicant had therefore not run foul of the provisions of O 53 r 3(6) of the Rules of Court 2012.

F *Merits*

The two contradictory medical reports

[62] I find that the Industrial Court was correct in finding that there was no
G basis for the company to dispute the authenticity of the medical report at pp 51–52 of CLB.

[63] The said medical report having thus been admitted in evidence meant that it was incumbent upon the applicant company to clarify the contradiction
H between the two reports.

[64] During the trial before the Industrial Court, COW1 had clarified the contradiction between the two medical reports in re-examination when she
I confirmed that the correct diagnosis was 'Tidak sihat buat selama-lamanya'.

[65] There was therefore clarification regarding the conflicting medical reports and the learned Industrial Court Chairman had erred in finding that there existed an unexplained contradiction.

[66] This fact alone however is not conclusive on the point of whether the applicant had justifiably decided to medically board out the respondent. This was because there was evidence that the respondent could recover if he was reunited with his family. This issue will be addressed in more detail later on.

Whether the respondent consented to be medically boarded out?

[67] There is a conflict of the evidence between the applicant company on the one hand and the respondent on the other as to whether the latter had consented to being boarded out.

[68] This issue I find to be an irrelevant consideration in any event as the question to be determined was whether the applicant company had sufficient grounds to come to the decision to medically board the respondent out.

[69] The issue therefore of whether the respondent had consented to this is of no consequence.

Non-calling of Dr Letchumi

[70] Although the applicant only wrote once to the hospital where Dr Anna Letchumi had last worked and there were no other attempts by the applicant company made to locate the witness, I do not find any measure of suppression of evidence on the part of the applicant.

[71] Under the circumstances, the Industrial Court was not justified in invoking the adverse inference under s 114(g) of the Evidence Act 1950 against the applicant. See *Munusamy v Public Prosecutor* [1987] 1 MLJ 492.

Whether the applicant company had an obligation to continue the employment of the respondent by making adjustments to his job function or scope?

[72] From the evidence before the Industrial Court, it appears that the respondent acquired the condition during the course of his employment with the applicant.

[73] COW1 testified that the respondent himself had told her that the cause of his condition was his transfer to KLIA which caused him to be apart from his family.

[74] COW1 further testified that the respondent's chances of recovery were bright provided he was reunited with his family in Penang. Because the

applicant company felt that was not a viable option at the time, COW1 recommended for the respondent to be medically boarded out.

[75] The applicant company was therefore faced with two options, first, recommend that the respondent be transferred back to Penang or secondly, recommend that he be medically boarded out.

[76] Faced with these two options, the applicant company unfortunately chose the one that would result in the applicant's loss of his livelihood.

[77] This raises the issue of whether the applicant company had a sound basis in recommending that the respondent be medically boarded out?

[78] The purpose and function of the medical board is to consider whether the respondent was medically fit to continue his employment or not.

[79] Although it was felt by COW1 that the respondent would have a bright chance of recovery if he were reunited with his family, this was considered as not viable at the time. No reasons were advanced for this.

[80] Therefore, it was felt that there was no alternative but to medically board him out.

[81] The issue that arises from this is whether the applicant company had a social obligation to assist the respondent to continue in his employment by making necessary adjustments including transferring the respondent back to Penang.

[82] This was an option which was open to the applicant company given the size of their organisation and their enormous resources.

[83] After all the underlying philosophy or jurisprudence behind industrial legislation including the scheme of the Industrial Relations Act 1967 is to promote industrial harmony. The Industrial Relations Act 1967 has therefore been construed to be a piece of beneficent social legislation.

[84] Parliment has recognised this by imposing a duty upon the Industrial Court to act according to the dictates of justice, equity and merits without too strict an adherence to form rather than substance. See s 30(5) of the Industrial Relations Act 1967. The right to livelihood has further been elevated to a constitutional guarantee as equivalent to a right to life itself. See *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261.

[85] In the case of *Gopalakrishnan a/l Vasupillai v Goodyear Malaysia Berhad and Anor* [2010] MLJU 651 the court analysed the approach to be adopted in dealing with cases relating to medical boarding out as follows:

> In the course of submission my attention was drawn to a number of relevant cases relating to medical boarding out cases. These cases deserve attention. In the *Sime Darby Plantations/Consolidated Plantations Berhad v Gopinathan* (Industrial Court case No 1:5/4 - hundred and 36/87) the Industrial Court analysed comprehensively some of the relevant rules pertaining to this area. It was said in this case:
>
> > *In a case of dismissal for sickness or partial disability where the contract of employment had admitted did not cease to subsist through frustration, the burden of proving the justness of the dismissal lies with the employer. In determining the issue, this court takes into consideration the size and administrative resources of the employer's undertaking. This court also takes into account the employer's obligations of social conscience to assist the workman to continue in his employment by minor adjustments to the job content, by transfer, even by the creation of a special job … where circumstances permit, these are not unreasonable considerations bearing in mind that nowadays many modern and socially conscientious employers go out of their way to give employment to handicapped persons.*
> >
> > ...
> >
> > *Having regard to the principles established in the cases … and in the total circumstances of this case before it, the court rules that the company acted in haste and below the standards required of a large multinational company which is bound by good conscience and equity to treat its employees reasonably, when it prevailed upon its medical advisers to 'medically board' the claimant out of his job, failed to assist him in any way by way of continuing his employment, and instead dismissed him summarily by giving him a month's wages.*
>
> In *Dapat Hotel Sdn Bhd (Holiday Inn, Johor Baru) v Kesatuan Kebangsaan Pekerja Pekerja Hotel, Bar and Restoran* (Industrial Court case No 13 - 297 - 84), the Industrial Court quoted with approval the passage in John McGlyne 'Unfair Dismissal Cases' and the passage reading:
>
> > 'Sickness and Unfair Dismissal'
> >
> > If an employee is incapacitated by ill-health and is no longer able to perform the job he was employed to do, his employer should consider whether or not the man could be kept in employment in another capacity. If there is an existing job, even if it is the lower paid, the employer should offer alternative employment to the employee. If the employee refuses any such offers, then it seems to be reasonable for the employer to dismiss the employee. It should be noted that the employer is only required to consider the employee's ability to perform, existing jobs - there is no duty on the employer to create a new job or to modify an existing one, in order to continue the employment'.
>
> In *Pushpadevi Singam v University Of Malaya* [1993] MLJU 228; [1993] 4 CLJ 602, it was stressed by the High Court that while the Medical Board had the right to take into consideration the history of medical leave taken by the

plaintiff, it could not base its conclusion solely on this factor and ignore other evidence which was favourable to the case of the plaintiff. The court added that the board was not set up as a disciplinary body to deliberate on the conduct and behaviour of the plaintiff but rather to look into the question as to whether the plaintiff was medically fit to continue with the employment.

The common strand in these cases is the holding that the employer in medical boarding out cases is expected to act reasonably in accordance with its obligations of social consciousness, and should attempt to offer an alternative employment to the employee, even though it might be a lower paying job. And the employer is expected to listen not only to the Medical Board, but must also consider whatever evidence there are that might be favourable to the plaintiff. Implicit in this, is the requirement that the employer, before it decides to act on the medical opinion, has also to properly listen to the employee. These principles that apply on top of the doctrine of frustration of the employment contract, if at all applicable on the particular facts of the case.

I do not find in the present award any reference to these principles. On the contrary the learned Industrial Court Chairman appears to unduly favour the evidence given for the employer. The evidence given by the Claimant appears to have been ignored. To this extent, the approach of the Industrial Court Chairman does not accord with the principle stated in *Pushpadevi Singam*. (Emphasis added.)

[86] It is clear that the approach regarding cases of this nature is to consider whether the workman could have continued in his employment by the making of adjustments such as transfers or even the creation a special job where circumstances permit. The size and resources of the particular establishment must also be considered in this respect. This is also consonant with the principle of industrial jurisprudence in promoting industrial harmony.

[87] Under all the circumstances therefore, I find that the Industrial Court had not committed any error by considering whether the respondent could have been reassigned to a less strenuous job close to his family and to a position that did not involve the use for firearms. Although the learned Chairman had based in part his decision on this point on the medical report which he found to be an unexplained contradiction, his conclusion and finding that under the circumstances, the applicant could have reassigned the respondent elsewhere was the correct one. The learned Chairman was also correct when he relied upon the case of *Syed Mahadzir bin Syed Abdullah v Ketua Polis Negara & Anor* [1994] 3 MLJ 391; [1994] 3 CLJ 244, in holding that the respondent ought to have been reassigned elsewhere within the applicants organisation.

[88] I do not find any error on the part of the Industrial Court in this respect that would bring it within any of the categories to warrant the exercise of a judicial review in the applicant's favour.

[89] I therefore find that the applicant had failed in its obligation to continue the employment of the respondent by making adjustments to his job scope and relocating him nearer his family.

[90] In the upshot, I dismiss this application with costs and I uphold the decision of the Industrial Court in respect of this point alone.

Application dismissed with costs; decision of the Industrial Court upheld.

Reported by Dzulqarnain Ab Fatar